FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 4 1939
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1939

No. 329

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & CO., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioners.

INDEX

	PAGE
1. Three-year statute controlling under the law of New York	1
2. Laches in New York law	4
3. The 100% deficiency	5
Conclusion	5

TABLE OF CASES

Borst v. *Corey*, 15 N. Y. 505	4
Butler v. *Johnson*, 111 N. Y. 204	4
Calhoun v. *Millard*, 121 N. Y. 69	5
Diefenthaler v. *Mayor*, 111 N. Y. 331	4
Erie R. Co. v. *Tompkins*, 304 U. S. 64	1, 2, 4, 6
Groesbeck v. *Morgan*, 206 N. Y. 385	5
Hanover Fire Insurance Company v. *Morse Drydock and Repair Company*, 270 N. Y. 86	2, 3
Platt v. *Wilmot*, 193 U. S. 602	3
Plet v. *Willson*, 134 N. Y. 139	4
Pollitz v. *Wabash R. Co.*, 207 N. Y. 113	5
Reisman v. *Hall*, 12 N. Y. S. (2d) 442	4
Rundle v. *Allison*, 34 N. Y. 180	2, 3
Welles v. *Yates*, 44 N. Y. 525	4
Wright v. *Russell*, 155 Misc. 877, 245 A. D. 708, 269 N. Y. 683	3

OTHER AUTHORITIES

New York Civil Practice Act § 49	2
§ 53	3

IN THE

Supreme Court of the United States

OCTOBER TERM 1939

HENRY RUSSELL, LAWRENCE MILLER, CHARLES STEERS, and JOHN P. WING, co-partners, doing business under the firm name of RUSSELL, MILLER AND CAREY, and SAMUEL A. PLEASANTS,

Petitioners,

against

JAMES S. TODD, JOSEPH R. WORK and WILLARD C. WEISS, co-partners, doing business under the firm name of J. S. TODD & Co., on behalf of themselves and all other creditors of THE OHIO JOINT STOCK LAND BANK OF CINCINNATI, OHIO,

Plaintiffs,

and

HOWARD Y. LISSENDEN, HENRY TRUXTON EMERSON, WILLARD C. WEISS and ALEX LOWENTHAL, as Members of The Ohio Joint Stock Land Bank of Cincinnati, Ohio, Creditors' Protective Committee,

Intervenors.

No. 329

PETITIONERS' REPLY BRIEF

Without renewing the controversy on the merits with regard to the questions argued in respondents' brief (the refutation of which is already suggested in our original brief), we beg leave to point out in a short reply the cardinal error into which respondents fall in dealing with the application of New York law under the rule of *Erie R. Co.* v. *Tompkins*, 304 U. S. 64.

1. *Three-year statute controlling under the law of New York.* Respondents seem to concede (brief, p. 5) that the

rule of *Erie R. Co.* v. *Tompkins* required the application in this case of the New York statute of limitations, rather than the old equity doctrine of laches, considered as a doctrine of substantive law. Assuming for the sake of argument our contentions on the subject, respondents say (brief, pp. 5-7) that the New York law will apply to this case the ten-year statute, not the three-year statute, and hence that the decision below was justified on other grounds than those adopted by the Circuit Court.

The fallacy of this argument is readily demonstrated. Respondents cite *Hanover Fire Insurance Company* v. *Morse Drydock and Repair Company*, 270 N. Y. 86, and *Rundle* v. *Allison*, 34 N. Y. 180, both cases of exclusively equitable cognizance and both cases in which the three-year statute could not possibly have been applied. The former was an action for reformation, the latter an action to enforce a trust. The discussion in both opinions is whether the six-year statute at law, or the residuary ten-year statute, governed the action. No consideration is given in either opinion to the three-year statute, for the very good reason that the three-year statute is not expressed to govern either type of action there involved. The three-year statute, Civil Practice Act § 49 (our main brief, p. 10), is expressed to govern

> "An action against a . . . stockholder of a moneyed corporation, or banking association, . . . to enforce a liability created by the common law or by statute."

It is manifest that this statute alone can be relevant to the limitation of an action brought in New York by or on behalf of a Federal Joint Stock Land Bank to enforce the liability imposed upon shareholders by a Federal statute.

It is merely frivolous to discuss as bearing upon the applicability of such a statute, decisions of the Court of Appeals dealing with the claimed applicability of the general six-year statute as against the ten-year statute, since the ten-year statute, Civil Practice Act § 53 (our main brief, p. 15), is expressed to govern actions

> "the limitation of which *is not specifically prescribed in this article.*"

The limitation of the present action to enforce a statutory shareholder's liability is, we repeat, specifically prescribed in the same article of the New York Civil Practice Act which contains the ten-year statute.

It is therefore misleading, to say the least, for petitioners to say, after citing the *Hanover* case, 270 N. Y. 86, and the *Rundle* case, 34 N. Y. 180,

> "the three-year statute being inapplicable in New York under the decisions of New York's highest court . . ." (brief, p. 7),

because *neither of those cases involved or could have involved the three-year statute.* On the other hand, the New York Court of Appeals, in denying leave to appeal, 269 N. Y. 683, from an Appellate Division decision, 245 A. D. 708, affirming a decision which did apply the three-year statute to an action of the character here involved, impliedly rejected respondents' contention. *Wright* v. *Russell,* 155 Misc. 877. This was an action by a creditor of an Illinois bank, individually and on behalf of all creditors, to enforce the Illinois statutory liability against a New York stockholder. *Held* on the authority of *Platt* v. *Wilmot,* 193 U. S. 602, that the action was barred by the New York three-year

statute. To the same effect is *Reisman* v. *Hall*, 12 N. Y. S. (2d) 442, Advance Sheets of June 27, 1939 (Appellate Division Third Department).

Without discussing further the New York law, we may note that respondents' contention even as to the applicability of the ten-year statute (brief, p. 7) is quite untenable under the authorities. The Court of Appeals has applied the six-year statute to many actions of equitable cognizance, such as suits by unpaid vendors of real property to foreclose their equitable lien (*Borst* v. *Corey*, 15 N. Y. 505; *Plet* v. *Willson*, 134 N. Y. 139), suits by creditors of a decedent to compel sale of his land to pay his debts (*Butler* v. *Johnson*, 111 N. Y. 204), suits to vacate an assessment and recover the tax (*Diefenthaler* v. *Mayor*, 111 N. Y. 331), and an accounting for timber cut as part of an equitable action to reform a deed (*Welles* v. *Yates*, 44 N. Y. 525).

2. *Laches in New York law.* Respondents do not controvert our analysis of laches as a doctrine of substantive law (our brief, p. 16) subject to the rule in *Erie R. Co.* v. *Tompkins*. They however contend that the doctrine of laches is still recognized in New York (brief, p. 7), and imply that it is recognized as a mode of limitation in equity superseding the statute of limitations. In this again they are demonstrably incorrect. Our statement was (brief, p. 15) that New York has abolished the doctrine of laches *where the relief asked relates to matters of right*. It is so held by the Court of Appeals in the two cases cited by us at page 15 of our main brief. We should think it beyond question that the relief prayed in this action as against the defendants is exclusively a matter of right, since the right to such relief is conferred by a Federal statute; it is in no

way a matter of equitable favor or discretion. Yet, in order to controvert us and to try to show that New York still recognizes the doctrine of laches, respondents cite two cases holding that laches will be applied in equity where the relief sought *is a matter of favor or discretion*, not of right. These are *Calhoun* v. *Millard*, 121 N. Y. 69, showing the discretionary nature of the relief at page 77; *Groesbeck* v. *Morgan*, 206 N. Y. 385, 389. The latter case is distinguished on the precise point involved in *Pollitz* v. *Wabash R. Co.*, 207 N. Y. 113, 130, cited in our original brief.

More need not be said, we submit, to show that the arguments of the respondents against the granting of certiorari, on the principal points of New York law selected by them for that purpose, are completely unfounded.

3. *The 100% deficiency.* In support of the contention that this action is exclusively equitable, respondents insist upon the fact that, when it was commenced, they did not *know* a 100% stockholders' liability was involved (brief, p. 8). Surely the criterion of the true character of the action is what the facts *actually were*, not what respondents knew. If in fact an apportionment of stockholders' liability among themselves was not necessary, the erroneous belief by the plaintiffs that it was necessary cannot rationally be contended to deprive the stockholders of a defense of limitations which was available upon the true facts.

CONCLUSION

The decision below is not warranted by the New York law of limitations, concededly made applicable herein under

the rule of *Erie R. Co. v. Tompkins*, and a writ of certiorari to review the same should accordingly be granted.

Respectfully submitted,

RALPH M. CARSON,
SAMUEL A. PLEASANTS,
Counsel for Petitioners.

Dated, New York, N. Y., September 30, 1939.

